ESTATE OF JASON CRANE

IBIA 83-28 Decided February 3, 1984

Appeal from an order issued after reopening by Administrative Law Judge Sam E. Taylor amending the original order determining heirs in Indian probate number H-122-55, 8123-55, IP TU 72 P 82.

Affirmed.

1. Indian Probate: Reopening: Generally

   An Administrative Law Judge has authority under 43 CFR 4.242(h) to reopen an Indian probate estate that has been closed for more than 3 years.

2. Indian Probate: Reopening: Generally

   The Board of Indian Appeals has consistently held that petitions to reopen closed Indian trust estates require compelling proof that delay in requesting relief was not occasioned by lack of diligence on the part of the petitioning party.

3. Indian Probate: Guardian Ad Litem: Generally

   Departmental regulations requiring that a guardian ad litem be appointed for a minor or for an incompetent person in an Indian probate proceeding are intended to ensure that the interests of such a party are fully represented at the hearing.

4. Indian Probate: Evidence: Generally--Indian Probate: Reopening: Generally

   The burden of proving that the initial decision in the probate of a deceased Indian's trust estate was incorrect is on the person seeking reopening.

APPEARANCES: Daniel G. Webber, Esq., Watonga, Oklahoma, for appellants; Bob Burke, Esq., Broken Bow, Oklahoma, for appellee. Counsel to the Board: Kathryn A. Lynn.

OPINION BY ADMINISTRATIVE JUDGE MUSKRAT

On April 8, 1983, a notice of appeal in the estate of Jason Crane (decedent) was forwarded to the Board of Indian Appeals (Board) by Administrative Law Judge Sam E. Taylor. The notice had been filed by Josie Crane Rednose, Ethel Crane Drunkard Stone Road, and Ada (Emma) Tobacco Crane (appellants). Appellants sought review of a January 28, 1983, order after reopening issued by the Administrative Law Judge, which amended the original probate decision in decedent's estate to find that Bertha Mae Ward Tonihka (appellee) was decedent's illegitimate daughter and was entitled to inherit his entire trust estate. For the reasons discussed below, the Board affirms that decision.

Background

Decedent, an unallotted Cheyenne Indian, died intestate in a railroad accident in San Bernardino, California, on December 18, 1954, at the age of 44. A hearing to probate his Indian trust estate was held on May 18, 1955. Decedent was survived by three sisters, appellants here. At the hearing both Mrs. Rednose and Mrs. Stone Road testified that decedent was never married and had no children. Based on this testimony, the testimony of several disinterested witnesses, and the Bureau of Indian Affairs' (BIA) family history information sheet, Examiner of Inheritance J. R. Graves issued an order on May 27, 1955, finding that decedent's trust estate should be equally divided among his three sisters.

On April 9, 1982, appellee filed a petition to reopen decedent's estate, alleging that she was his illegitimate daughter. Appellee stated that she was born to Alma Marie Jones on November 23, 1933, at the Home of Redeeming Love (Home), in Oklahoma City, Oklahoma, and was named Barbara Sue Jones. She was immediately placed with the Home for adoption, and was adopted on September 13, 1934, by Reed and Silsainey Ward of Idabel, Oklahoma. Appellee apparently learned in 1962 that she had been adopted, and discovered the identity of her real parents sometime in 1980. She was unable to obtain a copy of her original birth certificate until after the entry of a court order to open closed records on October 14, 1981. 1/ Upon finding that the original birth certificate did not list her father and knowing that her mother had named Jason Crane as the father, appellee attempted to ascertain whether the certificate of the Oklahoma State Department of Health could be amended to name Jason Crane as her father. She was advised it could not. She then contacted the Concho Agency, BIA, to determine the value of any property belonging to decedent which remained in trust. She filed her petition to reopen the estate on April 9, 1982.

The Administrative Law Judge found that the petition to reopen had merit, and ordered the estate reopened on July 2, 1982. A hearing was held on July 29, 1982, and was attended, among others, by appellee and her mother, and by Mrs. Rednose and Mrs. Stone Road.

1/ In cases of adoption, Oklahoma provides by statute for the substitution of a new birth certificate listing the adoptive parents. The original birth certificate and adoption records are then sealed and can be opened only by court order. See Exh. 11 to appellee's petition to reopen estate.

Testimony at the hearing established that appellee was the daughter of Alma Marie Jones (Clark) a non-Indian. Since she had no documentary proof that decedent was her father, appellee relied on the testimony of her mother to establish paternity. Mrs. Clark testified that she became pregnant as the result of an affair with decedent when she was 17. She further stated that she had no other boyfriends at the time appellee was conceived. Her parents would not permit her to marry decedent because he was Indian. Instead, she was forced to move to the Home and place the baby for adoption. Mrs. Clark stated that she had told the person filling out appellee's birth certificate that decedent was the father. Mrs. Clark had no contact with her daughter until 1980, although she had been informed, apparently by the supervisor of the Home, that her daughter was married, had four sons, and lived in southeastern Oklahoma. Mrs. Clark did not contact appellee because of fears regarding how her teenage children from her subsequent marriage would react to the situation (Tr. II at 12-21). 2/

Mrs. Stone Road stated that she was in Kansas at the time appellee was conceived and knew nothing of her brother's associations. She also testified:

> Q. Did Jason ever tell you that Alma Marie Jones had become pregnant by him?
>
> A. No, he didn't exactly say but he used to say I'm supposed to have a girl somewhere.
>
> Q. Did he say that to you on more than one occasion?
>
> A. Uh huh. Everytime he used to stop by and see me he would mention it.
>
> Q. What he mentioned was that he knew he had a little daughter somewhere?
>
> A. A girl somewhere but he doesn't know--
>
> Q. Did he tell you who the mother of the girl was?
>
> A. No.

(Tr. II at 22-23). This testimony disagreed with Mrs. Stone Road's testimony at the original probate hearing, when she stated that decedent had no children (Tr. I at 4).

Mrs. Rednose was reluctant to testify because she said she did not want the estate reopened, but stated generally that she did not know appellee's mother nor had she heard anything about her brother getting a young woman pregnant (Tr. II at 26-30).

2/ In order to differentiate between the two transcripts in this record, "Tr. I" will be used to designate the transcript of the original probate hearing held on May 15, 1955, and "Tr. II" will signify the transcript of the July 19, 1982, hearing on reopening.

Based on this evidence and testimony, the Administrative Law Judge issued an order on January 28, 1983, amending the original probate decision in decedent's estate. The order found that appellee was decedent's daughter, she had no actual or constructive notice of the original probate proceedings, she had diligently pursued her rights since learning the identity of her father, and at least one of decedent's sisters knew that decedent thought he had a daughter. The order concluded that a manifest injustice had occurred in the distribution of decedent's estate and that the injustice could and should be corrected. In accordance with the laws of the State of Oklahoma, the Administrative Law Judge ordered that the estate be distributed to appellee.

Appellants' notice of appeal followed this decision. Both sides have submitted briefs on appeal.

Discussion and Conclusions

Appellants raise six arguments why the order below is in error. The five procedural arguments will be addressed first.

[1] Appellants argue that the Administrative Law Judge had no authority to reopen an Indian probate estate that had been closed for more than 3 years. This argument is legally incorrect. Estates more than 3 years old can be reopened in accordance with 43 CFR 4.242(h). See Estate of Walter George and Minnie Racehorse George Snipe, 9 IBIA 20 (1981). The Administrative Law Judge was clearly acting within the scope of his authority in reopening this estate, even though it had been closed for 27 years.

[2] Appellants next argue that appellee was dilatory in filing her petition to reopen. The Board has held that petitions to reopen must demonstrate that the petitioner has diligently pursued the case since learning the facts necessary to permit a petition. See, e.g., Estate of Joseph Wyatt, 11 IBIA 244 (1983); Estate of Wilma Florence First Youngman, 10 IBIA 3, 89 I.D. 291 (1982).

The Administrative Law Judge found that appellee had diligently pursued her case. This finding is supported by the facts, which establish that although appellee knew her father's name in 1980, she was unable to obtain a copy of her birth certificate, which she thought would denominate her father, until 1981, after she had successfully pursued a court proceeding for that purpose. She then investigated whether or not the value of the estate she might receive would warrant the cost of seeking to reopen the estate.

The Board agrees that appellee has diligently pursued her case. All of her actions were consistent with a timely and reasonable attempt to gather evidence regarding the merits of her case 3/ and information regarding the practicality of seeking reopening.

3/ The Board also notes that appellee filed her petition while appellants, who were elderly, were still living and would have the opportunity to contradict her evidence. In denying other petitions to reopen estates closed for many years, the Board has commented on the fact that the petitions were filed after the deaths of those individuals who could be expected to have knowledge of the facts. See, e.g., Estate of Frank Pays, 10 IBIA 61 (1982); Estate of Katie Ross Stephens, 10 IBIA 9 (1982).

The third procedural allegation raised by appellants is that appellee's petition to reopen was not in the proper form. The arguments in support of this allegation, however, again are directed at the time between appellee's discovery of the identity of her father and the filing of her petition. The Board has already found that appellee was not dilatory in filing her petition. Furthermore, the Board finds that the petition for reopening and attached exhibits satisfied the regulatory requirements as to the form for such a petition.

Appellants next argue that because Ada (Emma) Tobacco Crane is incompetent, 4/ the Administrative Law Judge erred by failing to appoint a guardian ad litem to represent her interests at the hearing as required by 43 CFR 4.282. The record shows that the Administrative Law Judge attempted unsuccessfully to contact Ms. Crane. He inquired as to her whereabouts from her sisters at the hearing and was informed that they did not know where she was and had not heard from her in approximately 15 years. Mrs. Stone Road stated that she knew her sister was still alive because the BIA had not notified her that she had died (Tr. II at 26). Neither sister suggested that Ms. Crane was incompetent.

[3] Departmental regulations require that a guardian ad litem be appointed for a minor or an incompetent person in order to ensure that the interests of that person will be represented at the hearing. In this case, the Administrative Law Judge had no reason to believe that the appointment of a guardian ad litem for Ms. Crane was required. Furthermore, Ms. Crane's interests were identical to those of her sisters who did appear at and participate in the hearing. Under these circumstances, the Board declines to find that the hearing was invalidated by the fact that a guardian ad litem was not appointed for Ms. Crane. 5/

Appellants' fifth procedural argument is that they are "elderly * * * and in [an] advanced stage of senility and were unable to comprehend the nature of the Hearing which was held." The record simply does not support this argument. The transcript of the hearing shows that, although both Mrs. Stone Road and Mrs. Rednose are elderly, they were fully capable of comprehending the nature and purpose of the hearing and participating in the proceedings.

Mrs. Rednose stated that she did not wish to testify in the proceeding because she did not want the estate reopened (Tr. II at 26). She later decided to answer some questions, on occasion using an interpreter. She testified clearly and responsively when asked about decedent's alleged relationship with Mrs. Clark (Tr. II at 28-30).

4/ According to appellants' Brief on Appeal (at page 7): "One of the petitioners herein, Ada (Emma) Tobacco Crane, is an incompetent person, whose affairs are managed by the Superintendent of the Concho Agency [BIA], Concho, Oklahoma."

5/ If indeed Ms. Crane is legally incompetent as appellants assert, then the Administrative Law Judge's failure to appoint a guardian ad litem was perhaps in error. However, under the circumstances of this case, such an error was harmless and likewise insufficient to justify invalidating the hearing.

As to Mrs. Stone Road's abilities, the Board must agree with appellee: "Counsel for the Appellants is doing a great disservice to his own client, Mrs. Stone Road, when he says she is advancing in age and approaching 'senility.' Mrs. Stone Road is an educated woman and appeared to fully understand the meaning of the hearing. She comprehended questions asked her by * * * [counsel for appellee] and by Judge Taylor" (Answer Brief at 3).

Finally, appellants argue substantively that the evidence presented at the hearing was insufficient to support the finding of paternity. As previously noted, the evidence of paternity was based upon the testimony of appellee's mother. The Board, as presumably are other judicial or quasi-judicial forums concerned with questions of paternity, is hesitant to base a finding of paternity upon the uncorroborated testimony of the mother. Unlike many states, however, there is no Federal statute or regulation prohibiting a finding of paternity on such evidence in Indian probate cases. The Board has previously noted that, in an appropriate case, it might permit a finding of paternity on the uncorroborated testimony of the mother. See Ruff v. Portland Area Director, 11 IBIA 267, 273 n.13 (1983).

[4] The burden of proving that the initial decision in an Indian probate estate was incorrect is on the person seeking reopening. Wyatt, supra. The Board has thoroughly reviewed the record in this estate, including all testimony given at the original probate hearing, in order to determine whether appellee sustained this burden of proof. Initially, the Board notes that the Administrative Law Judge did not, and is not required to, expressly base his decision on witness demeanor. Consequently, the Board is not required to give special deference to his findings in regard to any conflicts in the testimony. Cf. Estate of Joshua Stone Arrow, 10 IBIA 104 (1982); Estate of Grace Akeen, a.k.a. Grace Akins, 10 IBIA 14 (1982).

Appellee alleges that she is the illegitimate daughter of decedent. Mrs. Clark's testimony concerning her alleged relationship with decedent and the circumstances surrounding appellee's birth and placement for adoption is entirely plausible.

The major impediment to appellee's case was the testimony at the original hearing which indicated emphatically that decedent had no children. Although the fact that other family members are not aware of the existence of a child of the decedent is not conclusive on the question of paternity, see, e.g., Estate of Harry M. Johnson, 10 IBIA 1 (1982), it is at least a circumstance that must be explained. Mrs. Stone Road testified at the second hearing, however, that she knew that decedent stated on many occasions that he had a daughter, but did not know her whereabouts. This testimony, including the fact that decedent specifically mentioned that the child was a female, lends credence to appellee's case, by acknowledging the possibility, previously unrevealed, that decedent had a daughter.

The evidence of paternity in this case is admittedly not overwhelming. The Board is convinced, however, that the preponderance of the evidence indicates that decedent was appellee's father.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the January 28, 1983, decision of the Administrative Law Judge amending the original probate order in this estate is affirmed.

_____
Jerry Muskrat
Administrative Judge

We concur:

_____
Franklin D. Arness
Administrative Judge

_____
Bernard V. Parrette
Chief Administrative Judge